Supreme Court, U.S.
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NO. 10-575

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IN THE OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2010

DEBORAH K. VENESEVICH

Petitioner

MICHAEL J. LEONARD AND FRANCINE SEISLOVE

Respondents

ON PEITITON FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Don Bailey, Esquire
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QUESTIONS PRESENTED

1. Did the Third Circuit Fail to follow its own law?

Suggested Answer Yes!

2. Did the Third Circuit erroneously deny jurisdiction?

Suggested Answer Yes!

3. Is our federal court system capable of disciplining itself?

Suggested Answer No!

4. Should the District court and Third Circuit Opinion below be struck?

Suggested Answer Yes!

LISTS OF PARTIES

All parties have been listed in the caption hereto.

CORPORATE DISCLOSURE

This document is not subject to any provisions of Supreme Court Rule 29.6.

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CITATIONS OF REPORTS BELOW

The Opinion of the Third Circuit Court of Appeals was filed on May 5, 2010 (*App A).* The Memorandum Opinion of the Honorable Christopher C. Conner was filed on December 19, 2008 (*App B).* The memorandum denying reconsideration was filed on January 6, 2009 (*App C).*

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Third Circuit, for which review is sought, was filed on May 5, 2010 (App C).

CONSITTUITIONAL PROVISION INVOLVED

The 5th Amendment to the U.S. Constitution is implicated in this case. The Amendment states in pertinent part as follows:

"No person...shall be deprived of life, liberty, or property without due process of law".

The 14th Amendment to the U.S. Constitution is implicated in this case. The Amendment states in pertinent part as follows... nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Deborah Venesevich is a public employee who employed Attorney Don Bailey to represent her in a civil rights action brought in the United States District Court for the Middle District of Pennsylvania. The case was referred to the Honorable Christopher C. Conner. After briefing, the case was dismissed by Judge Conner in a 10 page Memorandum Opinion on May 5, 2010 (*App B*). On pages 5-6 of Judge Conner's decision he entered into an egregious ad hominum attack on Attorney Don Bailey which began with an accusation that Bailey had plagiarized and was guilty of "misrepresentations" and had engaged in conduct exhibiting "dishonesty", "fraud" and "deceit".

Bailey sought the Court's reconsideration, pointing out that he had not written the brief, but, because of illness, had hired another attorney to do so. Bailey reviewed the brief, made suggestions, and then reviewed the final brief. He also engaged yet another attorney to review the brief and then submitted it to the Court.

All briefs and motions submitted by Attorney Bailey were courteous, polite, and informative, even after Judge Connor's unjustified vitriolic attack.

Judge Conner then attacked Don Bailey once more in his January 6, 2009 opinion changing his accusations to a unique and new interpretation of *Rule 11* where he applied a strict liability standard (*App "C"*). The trial court never addressed its repudication of Third Circuit law. The trial court

never investigated anything, held a hearing, nor sought any input of any type.

What then followed was a motion for summary affirmance after Don Bailey appealed Judge Conner's egregious misconduct. In the briefing for that motion, Mr. Bailey identified the attorney who had written his brief, pointed out numerous instances of plagiarism in the brief of the Assistant U.S. Attorney who submitted and briefed the motion for summary affirmance and expressly pointed out that numerous instances of plagiarism had been found in Middle District Court memorandums and many briefs, all without notice by Judge Conner or any other Middle District Judge. Ironically, shortly before this, it was revealed and was highly publicized, that Judge John E. Jones, III of the same Middle District Court, in his famous "Intelligent Design" Opinion had plagiarized over 90% of his opinion from an ACLU brief. For this he was applauded as brilliant, and as possessing a great mind. It is ironic that Don Bailey plagiarized nothing and yet was referred to as deceitful by the same Court.

When the matter was appealed, the Third Circuit, via Judge Ambro (Judge Ambro appears in many many cases where Mr. Bailey's appeals are dismissed, in fact all of Mr. Baileys cases are dismissed by the repetitive panels before which they appear in the Third Circuit) retained the issue as to the plagiarism. Actually, presumably suspecting defeat and judicial error, let alone judicial misconduct, the underlying issue had really become one about *Rule 11* and the extent of attorney liability

for submissions under circumstances setting standards for review in such situations.

Applicable Third Circuit law plainly indicated that Don Bailey had acted reasonably and HONESTLY.

See *CTC Imports & Exports v. Nigerian Petroleum Corp, 951 F.2d 573 at 578; Garr v. U.S. Healthcare, 22 F. 3d 1274, 1277 (3d Cir 1994) citing Pavelic v. LeFlore Marvel Entertainment Group, 493 U.S. 120, 125-27 (1989).*

Yet neither the U.S. District Court nor the Third Circuit panel addresses the reasonability of Bailey's actions which is the real issue affecting every lawyer in the United States. In fact the Third Circuit misapprehended the real issue in this case by denying jurisdiction. As such it is creating a huge public policy issue of great concern to many attorneys and the legal community at large.

Ironically the Third Circuit panel even adopts a factual error that is also plain on the face of the underlying pleading, motions, and briefs i.e. that Bailey had and has been warned previously by the Middle District (more specifically Judge Conner) for plagiarism, or something like it in an earlier case. That was and is totally incorrect. Bailey had committed no plagiarism from anywhere at anytime and never has. Bailey was not, and is not, a person who engages in fraud, deceit, or misrepresentation. To leave a case which Judge Conner rushed to publish, on the public record, is a violation of Baileys due process rights and the entire matter brings into question the activity of our Courts to police themselves.

REASONS FOR GRANTING THE WRIT

1. Did the Third Circuit Fail to follow its own law? Suggested Answer Yes!

The Third Circuit failed to follow its own established precedent. *In Garr v. U.S. Healthcare, 22 F.3d 1274, 1278, 1279 (3d Cir. 1994),* Judge Greenberg, still sitting as a Judge on the Third Circuit Court of Appeals today, clearly examined the issue of attorney responsibilities under F.R. Civ. P. 11 when making submissions. The Third Circuit panel had a duty to investigate and do a de novo review on the matter before it. The Third Circuit panel below misapprehending the facts and the law, failed to address this issue leaving a scandalous opinion by the District Court (*App "B" and "C"*) on the public record which is of great damage to an officer of the Court, Don Bailey, an American citizen (client) Deborah Venesevich, and which sets forth a precedent affecting the rights of all lawyers as to liability under *Rule 11.*

2. Did the Third Circuit erroneously deny jurisdiction? Suggested Answer Yes!

The Third Circuit had a duty to not only hear the matter below but to assume jurisdiction if, for no other reason, to address Judge Christopher C. Conner's misconduct which was expressly alleged by Attorney Bailey in a number of briefs. The refusal to appropriately review the underlying matter on a denial of jurisdiction rationale, in turn based on Judge Conner's failure to officially sanction Mr. Bailey, was an error by the Third Circuit panel that

had a duty to investigate and do a de novo review on the matter before it. The Third Circuit's misapprehension of the facts further added fuel, so to speak, to the errors of Judge Conner. Allowing the scandalous opinion of Judge Conner to stand uncorrected and unaddressed upon the public record did not merely cause harm to Mr. Bailey and Ms. Venesevich but provides an impossible standard to all attorneys' in the United States as to *Rule 11*.

Judge Roth refers to Judge Conner's words as a mere "observation" while noting a difference of opinion among the circuits on similar circumstances before this Court. Merely identifying Judge Conner's footnote as an "observation" does not address the circumstances or sanctioned effect of his opinion and its footnote.

See *In re complaint Judicial Misconduct, No. 05-8907, United States Court of Appeals for the Ninth Circuit 517 F.3d 563 (January 14, 2008); In re Complaint of Judicial Misconduct of the Ninth Circuit, 605 F.3d 1060 (May 21, 201).* The cases go on and on. The Third Circuit panel was confronted with this case of ad hominum abuse. Virtually hundreds of cases in the federal system make it plain that Federal Judges have a duty to address incidents of judicial misconduct. Here not one Court or even a single judge fulfilled their responsibility to address Petitioners' allegations of judicial abuse. Avoiding that responsibility by denying jurisdiction because Judge Conner did not "sanction" Attorney Bailey was error. What he did was for more ominous than a mere sanction. It also raises extremely cogent issues of why Judge Conner did not sanction Bailey –

why the Third Circuit did not sanction Bailey – and why the third Circuit left the trial court decision on the public record without removing or correcting it.

This Court should grant the writ for plain reasons. The first is that leaving the opinion that Judge Conner literally rushed to publish, on a public record establishes a highly questionable precedent as to attorney's Responsibilities under Rule 11. It's an impossible standard that no Officer of the Court should be required to reach, and this Court's guidance is needed for the benefit of an applicable *Rule 11* standard to serve all lawyers across the entire nation. Further, by not addressing Judge Conner's misconduct the Third Circuit issued a license to federal jurists inviting the use of their power to adjudicate as a personal vehicle for unsupported ad hominum attacks.

Further, in this particular case, by avoiding these important issues through denying jurisdiction the Third Circuit departed from its own law. The issue of judicial responsibility is at the forefront of current public concerns. It is not addressed when an appellate Court does not address an important issue presented directly to it, which is not agreed to among the circuits.

3.) and 4.) Are Courts capable of disciplining themselves? If the meaning of due process, applied to protected limitations on individuals and government entities, traditionally applied by our Courts, is to have meaning at all it must have meaning in our Courts. Did Don Bailey receive due process, and if so, how and where? There has been no hearing, no investigation and no right to question at any place in

any manner. There has only been a career smearing litany of misconduct inappropriately applied by a procedure and officials applying unconstitutional sanctions in an unconstitutional manner, If our courts cannot be replied upon to treat officers of this Court in a process respectful of due process standards (procedural and substantive due process standards) then how can citizens be expected to respect our Courts? *See In re Complaint of Judicial Misconduct No. 08-90113, United States of Appeals for the Ninth Circuit, 570 F.3d H44, (June 24, 2009); In re Judicial Complaint No. 07-89020 Ninth Circuit, 517 F.2d 558 (January 14, 2008).* The cases go on and on. This Court needs to addresses the need to reform the system. Destroying civil rights or mistreating civil rights lawyers is an abrogation of our Court systems responsibilities.

CONCLUSION

The Writ should be granted because the Third Circuit has departed from its own standards and additionally because the opinion on the Public record below is in violation of any reasonable standard of *Rule 11* enforcement and is therefore an obstruction to proper enforcement standards for *Rule 11.* Last, the Third Circuit erred in not addressing Judge Connor's misconduct and by not procedurally reacting in a correct manner. The offending opinion must be stricken.

APPENDIX B
Third Circuit Court of Appeals Opinion
Dated May 5, 2010.

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 09-1222

DEBORAH VENESEVICH,

Appellant

v.

MICHAEL LEONARD
AND FRANCINE
SEISLOVE

Appellees

Appeal from the United States District Court for the Middle District of Pennsylvania

(D. C. No. 1-07-cv-02118)
District Judge:
Hon. Christopher C. Conner

Submitted under Third Circuit LAR 34.1(a) on
October 2, 2009

Before: AMBRO, GARTH and ROTH,

Circuit Judges

(Opinion filed: May 5, 2010)

OPINION

ROTH, Circuit Judge:

Deborah Venesevich appeals the District Court's refusal to vacate a footnote rebuking her attorney for plagiarizing text from judicial opinions in a brief submitted to the court. For the reasons below, we will affirm the order of the District Court.

Venesevich, employed by a federal agency, filed an action against her employer for unlawful retaliation under Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). The District Court granted the defendants' motion to dismiss because, under Bush v. Lucas, 462 U.S. 367 (1983), her Bivens claim was foreclosed by administrative remedies available under the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111. We granted summary affirmance of the District Court's dismissal of Venesevich's claims.

The sole issue on appeal concerns Venesevich's brief submitted by attorney Donald Bailey in opposition to the defendants' motion to dismiss. Pages six through ten of the brief consist almost entirely of text lifted from judicial opinions without attribution. In footnote 2 of his memorandum dismissing Venesevich's claims, Judge Christopher Connor issued a "direct rebuke" criticizing Mr. Bailey for plagiarism. (App. 12.) The

footnote recited the court's prior admonishment of Mr. Bailey for the same practice in Schultz v. Wilson, No. 04-CV-1823, 2007 WL 4276696, at *6 n.13 (M.D. Pa. Dec. 4, 2007). The District Court denied Mr. Bailey's motion to vacate the memorandum and strike the footnote. (App. 19-20.)

We of course have jurisdiction to review a District Court's imposition of sanctions, see, e.g., Gary v. Braddock Cemetery, 517 F.3d 195 (3d Cir. 2008), but the District Court's statement in its dismissal order was not a sanction. Nor do its comments in its order denying reconsideration qualify as a sanction. We therefore lack jurisdiction.

In Bowers v. NCAA, 475 F.3d 524 (3d Cir. 2007), we noted "disagreement among the courts of appeals as to whether and when a court's statement in a judicial opinion amounts to a sanction 'affecting an attorney's professional reputation' and thus 'imposing] a legally sufficient injury to support appellate jurisdiction.'" Id. at 543 (quoting Butler v. Biocore Med. Techs., Inc., 348 F.3d 1163, 1167-68 (10th Cir. 2003) (alteration in original)). We observed the courts' "near complete agreement than an order rising to the level of a public reprimand is a sanction"; but qualified that by acknowledging that "mere judicial criticism is insufficient to constitute a sanction." Bowers, 475 F.3d at 543. We found it unnecessary to wade deeply into the issue because the District Court order in that case granted a motion explicitly requesting the imposition of

sanctions, and the order expressly stated that it was intended as a sanction. Id. at 544.

The District Court action in this case differs materially from the one in Bowers. The court in this case merely made an observation in a footnote, in an order devoted principally to the merits of the underlying litigation. The order was entered upon a motion to dismiss, not a motion for sanctions, and the District Court did not formally indicate that it intended to sanction Bailey. The statement was more or less a passing remark, made in the course of a ruling on the merits. Our very recent precedent further confirms that a judicial admonishment of this type is not necessarily considered a sanction. See Grider v. Keystone Health Plan Central, Inc., 580 F.3d 119, 145-46 (3d Cir. 2009) (holding District Court abused its discretion in concluding that Magistrate Judge's admonishment was a sanction). Because the challenged language in the District Court's order was mere judicial criticism, and not a formal sanction, we lack jurisdiction over the appeal. See Weissman v. Quail Lodge, Inc., 179 F.3d 1194, 1200 (9th Cir. 1999); In re Williams, 156 F.3d 86, 93 (1st Cir. 1998).

For the reasons stated above, we will dismiss the appeal.

APPENDIX B
MEMORANDUM OF THE MIDDLE DISTRICT COURT OF PA DATED DECEMBER 19, 2008

IN THE UNITED STATES DISRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DEBORAH VENESEVICH NO. 1:07-CV-2118
Plaintiff

v.

MICHAEL J. LEONARD and
FRANCINE SEISLOVE
Defendants

MEMORANDUM

This is a civil rights action brought by plaintiff Deborah K. Venesevich ("Venesevich") against her superiors, defendants Michael J. Leonard and Francine Seislove. All parties hereto are federal employees. Venesevich alleges that defendants violated her First Amendment rights by retaliating against her for raising complaints about their management practices. Defendants have filed a motion to dismiss (Doc. 11) on the ground that Venesevich claims are not cognizable as a matter of law. For the reasons that follow, the motion will be granted and the case closed.

I. Factual Background

Venesevich works as a special agent for the Federal Investigative Services Division of the Office of Personnel

Management ("OPM"). (Doc. 1 H 1.) She was compensated at grade GS-7 on the General schedule pay scale at the time she filed the instant complaint (Id. 12).

At an unspecified point during her employment, Venesevich immediate supervisor, defendant Michael J. Leonard ("Leonard"), allegedly mismanaged government resources under his control. (Id. 17, 20.) Venesevich has not identified which resources Leonard purportedly wasted, nor has she described the manner in which he did so. At some point, she broached the subject with Leonard, who allegedly responded through a series of adverse actions, including withholding promotions, assigning her to undesirable tasks, and denying her a choice of work vehicles and parking privileges. (Id. 17, 21.)

Venesevich then reported Leonard's conduct to his supervisor, defendant Francine Seislove ("Seislove"). (Id) Seislove allegedly recognized-the impropriety of Leonard's conduct but failed to remedy the situation. (Id. 22, 24.) Instead, she assigned Venesevich a ride-along mentor and temporarily transferred her to a duty station in New Jersey, where Venesevich shadowed an agent from another office under Seislove's command. (Id. 23.) Venesevich alleges that Seislove performed these actions in further retaliation for her complaints about Leonard's conduct. (Id. 22-23, 25.)

Venesevich alleges that in the absence of defendants' conduct she would presently qualify for compensation at a grade GS-11 or GS-12 level. (Id. 13-14.) She contends that colleagues with positions and experience similar to hers have received promotions [1]while she has not. (Id. 14-16.)

Venesevich filed the instant complaint on November 20, 2007, requesting damages for alleged violations of her First Amendment rights. (See Doc. 1 at 7 & 27.) She advances a retaliation claim under Bivens v. Six Unnamed Agents of the Federal Bureau of Narcotics. 403 U.S. 388 (1971), to which she appends a civil conspiracy claim under state law. Defendants contend that these claims cannot be advanced by plaintiffs such as Venesevich, who have access to statutory federal civil service remedies for adverse actions that arise during the course of their employment. The parties have fully briefed these issues, which are now ripe for disposition.

II. Standard of Review

Rule 12(b) (6) of the Federal Rules of Civil Procedure provides for the dismissal of complaints that fail to state a claim upon which relief can be granted; FED. R. Civ. P. 12(b) (6). When ruling on a motion to dismiss under Rule 12(b) (6), the court must "accept as true all [factual] allegations in the complaint and all reasonable inferences that can be drawn there from, and view them in the light most favorable to the plaintiff." Kanter v. Barella. 489 F.3d 170,177 (3d Cir. 2007) (quoting Evancho v. Fisher. 423 F.3d 347,350 (3d Cir. 2005)). Although the court is generally limited in its review to the facts in the complaint, it "may also consider matters of public record, orders, exhibits attached to the complaint and items appearing in the record of the case." Oshiver v. Levin. Fishbein. Sedran & Berman. 38 F.3d 1380, 1384 n.2 (3d Cir. 1994); see also In re Burlington Coat Factory Sec. Litig. 114 F.3d 1410, 1426 (3d Cir. 1997).

Federal notice and pleading rules require the complaint to "give the defendant notice of what the . . . claim is and the grounds upon which it rests." Sershen v. Cholish, No. 3:07-CV-1011, 2007 WL 3146357, at *4 (M.D. Pa. Oct. 26, 2007) (quoting Erickson v. Pardus, - U.S. 127 S. Ct. 2197, 2200 (2007)). The plaintiff must present facts that, if true, demonstrate a plausible right to relief. See FED. R. CIV. P. 8(a) (stating that the complaint should include "a short and plain statement of the claim showing that the pleader is entitled to relief) ; Bell Atl. Corp. v. Twombly, 550 U.S. 544, -, 127 S. Ct. 1955, 1965 (2007) (requiring plaintiffs to allege facts sufficient to "raise a right to relief above the speculative level"); Victaulic Co. v. Tieman, 499 F.3d 227, 234 (3d Cir. 2007). Thus, courts should not dismiss a complaint for failure to state a claim if it contains "enough factual matter (taken as true) to suggest the required element. This does not impose-a probability requirement at the pleading stage, but instead simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element." Phillips v. County of Allegheny, 515 F.3d 224, 234 (3d Cir. 2008) (quoting Twombly, 550 U.S. at 127 S. Ct. at 1965). Under this liberal pleading standard, courts should generally grant plaintiffs leave to amend their claims before dismissing a complaint that is merely deficient. See Grayson v. Mayview State Hosp., 293 F.3d 103,108 (3d Cir. 2002); Shane v. Fauver, 213 F.3d 113,116-17 (3d Cir. 2000).

III. Discussion

Venesevich advances a First Amendment retaliation claim under Biven Six Unnamed Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) based upon defendants' response to her criticism of Leonard's job performance. She also asserts a state law conspiracy claim, alleging that defendants colluded to deprive her of her First Amendment rights.

[2] The court is both disappointed and disturbed to conclude that plaintiff's attorney, Don Bailey ("Attorney Bailey"), has plagiarized a significant portion of plaintiffs brief in opposition to the motion to dismiss. Approximately five of the eight pages of discussion are copied verbatim from judicial opinions issued by the United States Court of Appeals for the Third Circuit, this court, and our sister court for the Eastern District of Pennsylvania. Compare (Doc. 15 at 8-9), with Sarullo v. U.S. Postal Serv., 352 F.3d 789, 795 (3d Cir. 2000); compare (Doc. 15 at 5-6), with Mitchum v. Hurt, 73 F.3d 30,35 (3d Cir. 1995); compare (Doc. 15 at 9). with Johnson v. Orr, 780 F.2d 386, 395 n.17 (3d Cir. 1986); compare (Doc. 15 at 6), with Vieux v. Smith, Mo. 4*07 CV 299 2W7WLA65fl579rat 8-flA-Pa.-JurA (Doc. 15 at 10-11). with Bower v. Stewart, No. 1.03-CV-0792, 2006 WL 3069340, at *3 (M.D. Pa. Oct. 26, 2006); compare (Doc. 15 at 7-8), with Newmark v. Principi, 262 F. Supp. 2d 509, 513 (E.D. Pa. 2003). The one-page standard of review section also mirrors that frequently employed by our

"A Bivens action, which is the federal equivalent of the [42 U.S.C.] § 1983 cause of action against state actors, will lie where the defendant has violated the plaintiffs rights under the color of federal law."[3] Brown v. Philip Morris, 250 F. 3d 789, 800 (3d Cir. 2001);see also Egervary

colleague, the Honorable Sylvia H. Rambo, with suspicious equivalence. Compare (Doc. 15 at 4-5), with, e.g., Foster v. JLG Industries, 372 F. Supp. 2d 792, 797-98 (M.D. Pa. 2005). Indeed,

none of the legal research contained in Attorney Bailey's brief appears to be his own work product, yet he has not quoted or cited any of these cases for the content reproduced from them.

The federal bench has denounced such mass appropriation as improper, "completely unacceptable," United States v. Bowen, 194 F. App'x 393, 402 n.3 (6th Cir. 2006), and "reprehensible," Velez v. Alvarado, 145 F. Supp. 2d 146,160 (D.P.R. 2001). Although reliance upon precedent forms the bedrock of legal argument, "citation to authority is *absolutely required* when language is borrowed." Bowen, 194 F. App'x 402 n.3 (emphasis added); see also Denton v. Ricvlev, No. 1:07-CV-211, 2008 WL 4899526, at *2 n.2 (E.D. Tenn. 2008) ("Counsel's assertion that large amounts of text can be copied without attribution is incorrect."). In fact, several courts have recognized that plagiarism violates the prohibition that state ethics codes place on misrepresentation and deceit. See, e.g., In re Burghoff, 374 B.R. 681, 684-85 (Bankr. N.D. Iowa 2007) (concluding that plagiarism violated Iowa Rule of Professional conduct 32:8.4, which is substantively identical to Rule 8.4 of the Pennsylvania Rules of Professional Conduct); Kingvision Pay Per View, Ltd. v. Wilson, 83 F. Supp. 2d 914, 916 n.4 (W.D. Tenn. 2000) (characterizing plagiarism as potentially violative of ethical rules); In re Lamberis, 443 N.E.2d 549, 552 (111. 1982) (holding that plagiarism constituted deceit under applicable rules of professional conduct). The Third Circuit has also been highly critical of this conduct, concluding in United States v. Lavanture, 74 F. App'x 221, 224 n.2 (3d Cir. 2003), that an appellate counsel who plagiarized less text than Attorney Bailey" ill-represent[ed] his client's interests " Id.; see also Vasquez v. City of Jersey City, No. 03-CV-5369, 2006 WL 1098171, at *8 n.4 (D.NJ. Mar. 30, 2006) (expressing "displeasure" with a submission that quoted a judicial opinion at length without attribution).

Attorney Bailey's plagiarism is particularly troubling because this court previously issued an admonition about such conduct in a case in which he participated. In Schultz v. Wilson, Attorney Bailey's co-counsel submitted a brief that contained over a

page of text copied from an opinion issued by the Eastern District of Pennsylvania. No. 1:04-CV-1823, 2007 WL 4276696, at *6 n.13 (M.D. Pa. Dec. 4, 2007). The court advised Attorney Bailey and his co-counsel that "it is certainly misleading ... to quote at length a judicial opinion (or, for that matter, any source) without clear attribution" and disapproved the practice. Id. (quoting Lavanture, 74 F. App'x at 224 n.2 (omission in original)). This prior admonition has clearly passed unheeded.

The court will therefore issue a more direct rebuke: Attorney Bailey's plagiarism is professional misconduct, and it is unacceptable behavior by a member of the bar of the Middle District of Pennsylvania. Plagiarism constitutes misrepresentation and is therefore a violation of Rule 8.4(c) of the Pennsylvania Rules of Professional Conduct and of the Local Rules of Court.

See PA. R. PROF. CONDUCT 8.4(C) ("It is professional misconduct for a lawyer to... engage in conduct involving dishonesty, fraud, deceit or misrepresentation."); L.R. 83.23.2 (applying Pennsylvania Rules of Professional Conduct to practice before this court). The court expects that Attorney Bailey's future submissions will conform to all applicable standards of professional conduct.

Defendants apparently concede for purposes of the instant motion that they were acting under color of federal law.

v. Young, 366 F.3d 238, 246 (3d Cir. 2004). "[C]ourts have generally relied upon the principles developed in the case law applying section 1983 to establish the outer perimeters of a Bivens claim against federal officials." Schrob v. Catterson, 948 F.2d 1402, 1409 (3d Cir. 1991).

Venesevich advances a Bivens action in which she alleges that Leonard retaliated against her by giving her undesirable work and by denying her promotions, salary increases, choice vehicle assignments, and parking privileges. Seislove allegedly infringed plaintiffs rights by placing her with a ride-along mentor and by temporarily transferring her to New Jersey. Generally, a First Amendment retaliation plaintiff must aver: (1) conduct

or speech protected by the First Amendment; *(2)* retaliatory action sufficient to deter a person of ordinary firmness from exercising his first Amendment rights; and (3) a casual link-between. the constitutionally protected conduct or speech and the retaliatory action. Thomas v. Independence Twp., 463 F.3d 285, 296 (3d Cir. 2006); see also, e.g. . Eichenlaub v. Twp. of Indiana, 385 F.3d 274, 282 (3d Cir. 2004); Rauser v. Horn. 241 F.3d 330, 333 (3d Cir. 2001).

Federal employment, however, may render a First Amendment Bivens claim untenable if the claim arises from the course of the plaintiffs employment. Under Bush v. Lucas, 462 U.S. 367, 390 (1983), a federal employee may not lodge a First Amendment claim for damages[4] against a supervisor if Congress has created a remedial statutory framework for

[4]Claims for injunctive relief are unaffected by Bush. See Mitchum, 73 F.3d at 35-36.

handling such claims. Schweiker v. Chilickv, 487 U.S. 412, 423 (1988); Purtill v. Harris, 658 F.2d 134,137 (3d Cir. 1981) ("[I]n light of available civil service remedies a federal employee has no cause of action for damages under the first amendment for retaliatory demotion."). The Civil Service Reform Act of 1978 ("CSRA"), Pub. L. 95-454, 92 Stat. 1111, provides such a structure.[5] Bush, 462 U.S. at 390. Hence, if the CSRA provides a putative plaintiff with a remedy for a First Amendment violation that occurs during the course of employment, the employee may not maintain a separate Bivens action to vindicate the wrong. Wright v. Hadrick. 90 F. App' x 641, 642 (3d Cir. 2004) ([T]he CSRA provides the sole remedy for damage claims brought by federal employees who are subject to its protections.").

Bush forecloses Venesevich retaliation because she may seek redress under the CSRA. At all times pertinent to this action, Venesevich worked as a special agent for OPM. (Doc. 1 1, 11.) As a federal employee, the CSRA allows her to file a complaint with the Office of Special Counsel (hereinafter "the Special Counsel"), an entity that "receive[s] and investigate] allegations of prohibited personnel "practices" by federal employees.[6] 5 U.S.C. § 1212(a)(2); see also 5 C.F.R. 1800.1(c)(establishing procedures for filing complaints arising from prohibited personnel practices). The Special Counsel investigates complaints and submits disciplinary recommendations to the Merit Systems Protection Board (hereinafter "the Board"), which adjudicates the recommended sanctions. See 5 U.S.C. § 1215(a) (1); see also 5 C.F.R. § 1201.2(a) (stating that the Board possesses original jurisdiction over all actions brought by the Special Counsel). If a federal employee files a complaint with the Special Counsel and the Special Counsel recommends no disciplinary action, the employee may appeal the Special Counsel's decision directly to the Board. See 5 U.S.C. § 1221 (allowing employees who suffer prohibited personnel practices to seek relief directly from the Board); id § 1214(a) (3) (requiring most employees-to seek-corrective action from the Special Counsel for an action directly with the Board). An adverse decision before the Board is subject to judicial review. See id. § 7703.

These comprehensive remedial structures provide Venesevich with an adequate, meaningful remedy to vindicate the alleged First Amendment violations by Leonard and Seislove. See Sarullo v. U.S. Postal Serv. . 352 F.3d 789, 796 (3d Cir. 2003) (stating that the CSRA provides meaningful remedies in a variety of claims in which the plaintiffs "status as a federal employee is

central to [the] complaint"); Simpson v. McCarthy, 741 F. Supp. 95,96 (W.D. Pa. 1990) ("Bush v. Lucas held that the Supreme Court would not authorize a Bivens action for federal employees whose First Amendment right to speak on a matter of public concern had been infringed by a superior." (citations omitted)). She must employ this remedial system in lieu of a Bivens action.[7]

IV. Conclusion

The remedial system established by the CSRA provides Venesevich an adequate.

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[3] Venesevich contends that she may advance a state law conspiracy claim against defendants regardless of the disposition of her federal claims. The parties have not identified any precedent in which the United States Court of Appeals for the Third Circuit has addressed Bush's applicability to state tort claims, and the court's independent research has produced none. However, several federal courts, including our sister court for the Eastern District of Pennsylvania, have held that such claims are precluded in light of courts' restraint in recognizing judicially created remedies when "Congress has provided mechanisms for constitutional violations that may occur in the course of [administering a federal government program]." Schweiker, 487 U.S. at 423; see Henderson v. Vet. Affairs Med. Ctr., No. Civ A. 02-7756, 2003 WL 21294915, at * 1 (E.D. Pa. Jan. 28, 2003) ("The CSRA precludes any other theory of relief, including a Bivens claim against another remedy for the First Amendment deprivations of which she complains. Her Bivens complaint will be dismissed without prejudice to her right to pursue a claim within this remedial structure. An appropriate order accompanies this memorandum federal employee, a state *law tort claim against other employees* or federal agencies, or any Constitutional claims against the government generally." (emphasis added)) ; see also Meredith v. U.S. Dep't of Justice, 166 F. 3d 1214, 1998 WL 833690,

at *4 (6th Cir. 1998) (unpublished table decision); Saul v. United States. 928 F.2d 829, 843 (9th Cir. 1991); Broughton v. Courtney. 861 F. 2d 639, 644 (11th Cir. 1988) (holding that when "an employee challenges personnel actions within the [CSRA's] coverage under state law, those challenges are preempted" (emphasis added)). The court finds that preclusion of state tort claims covered by the CSRA provides an adequate remedy for Venesevich' s alleged wrongs and is consistent with the deference that Bivens and Bush accord to Congressional policymaking. Venesevich's state conspiracy claims will therefore be dismissed. Were Bush preclusion of these claims inappropriate, however the court would nevertheless decline to exercise supplemental jurisdiction over them. 28 U.S.C. 1367 (c) (3). (The district courts may decline to exercise supplemental jurisdiction over a claim...if...the district court has dismissed all claims over which it has original jurisdiction").

S/ Christopher C. Conner

CHRISTOPHER C. CONNER
United States District Judge

Dated: December 19, 2008

APPENDIX C
ORDER MIDDLE DISTRICT COURT
DATED JANUARY 6, 2008

IN THE MIDDLE DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA

DEBORAH K. VENESEVICH 07-2118
Plaintiff

v.

MICHAEL J. LEONARD and
FRANCINE SEISLOVE,
Defendants

ORDER

AND NOW, this 6th day of January, 2008, upon consideration of plaintiffs motion to vacate (Doc. 23) Footnote 2 of the memorandum and order (Doc. 22) dated December 19, 2008, in which the court identified numerous instances of mass appropriation of work product from judicial opinions without attribution (see id. at 5 n.2), and it appearing that plaintiffs counsel asserts that he is not responsible this misconduct because he retained an unidentified attorney to draft the brief, (see Doc. 23 at 3-4), and the court concluding that appropriation without attribution is immediately apparent from the face of the brief, (see Doc. 22 at 5 n.2), that Rule 11 of the Federal Rules of Civil Procedure imposes a "'personal, non-delegable

responsibility'" on the signer of a filing to perform a "reasonable inquiry into the contents of the pleading, motion, or other paper" to ensure that it complies with the signer's Rule 11 obligations, Garr v. U.S. Healthcare, Inc., 22 F.3d 1274,1278 (3d Cir. 1994) (quoting Pavelic & LeFlore v. Marvel Entm't Group, 493 U.S. 120,127 (1989)); Kramer v. Nowak, 908 F. Supp. 1281, 1293 (E.D. Pa. 1995) (stating that ultimate responsibility for validating the "truth and legal reasonableness" of court filings rests exclusively with the signer and that such responsibility cannot be delegated to other attorneys (quoting Pavelic, 493 U.S. at 126-27))[1], and that the conduct of counsel's unidentified associate is therefore insufficient to vitiate counsel's personal responsibility for the filing, it is hereby ORDERED that the motion to vacate (Doc. 23) is DENIED.

/ Christopher C. Conner
CHRISTOPHER C. CONNER
United States District Judge

"The court recently admonished Attorney Bailey in an unrelated matter for attempting to shirk his non-delegable duties under Rule 11. In Conklin v. Warrington Township, 476 F.Supp.2d 458, 459 (M.D. Pa. 2007), the court observed: "Attorney Bailey's act of signing the motion ... carries with it the explicit representations and confluent obligations of Rule 11. That Attorney Bailey chose to submit a motion and brief ostensibly prepared by his client does not alter his fundamental obligations under Rule 11." (citations omitted). Under the circumstances, Attorney

Bailey's efforts to absolve his transgressions by casting blame upon an unidentified ghost writer are ill-considered and ineffectual.